

APPEAL NO. 040874
FILED JUNE 10, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on March 25, 2004. The hearing officer determined that in (Docket No. 1), respondent 1's (claimant) (date of injury for Docket No. 1), compensable injury extends to and includes a repetitive trauma injury to her left elbow, right shoulder, and left shoulder; that the claimant had disability from the (date of injury for Docket No. 1), compensable injury beginning on March 2, 2002, and continuing through the date of the hearing; that in (Docket No. 2), respondent 2 (carrier 2) did not waive the right to dispute the alleged injury of (date of injury for Docket No. 2), even though it did not timely contest compensability; that on (date of injury for Docket No. 2), the claimant did not sustain a compensable repetitive trauma injury; and that the claimant did not have disability as a result of the claimed injury of (date of injury for Docket No. 2). The appellant (carrier 1) appealed, asserting that the hearing officer erred in reaching all of the above-listed determinations. Carrier 2 responded, urging affirmance based upon the evidence presented at the hearing, and further asserting that carrier 1 lacks standing to appeal any determinations related to Docket No. 2. The claimant responded, apparently urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The hearing officer did not err in determining that the claimant's (date of injury for Docket No. 1), compensable injury extends to and includes a repetitive trauma injury to her left elbow, right shoulder, and left shoulder, and that the claimant had disability from the (date of injury for Docket No. 1), compensable injury beginning on March 2, 2002, and continuing through the date of the hearing. These determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In view of the evidence presented, we cannot conclude that the hearing officer's determinations regarding extent-of-injury and disability are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We note that in its response, carrier 2 asserts that carrier 1 lacks standing to appeal any determinations related to Docket No. 2. In essence, carrier 2 is asserting that carrier 1 cannot appeal the hearing officer's determinations regarding compensability, disability, and carrier 2's waiver as they relate to the claimed (date of injury for Docket No. 2), injury because carrier 1 was not a party to that claim. We cannot agree. This matter was held as a consolidated hearing with all necessary

parties joined. The hearing was not bifurcated, nor did any party request it to be so. One decision and order was issued by the hearing officer. All parties had conflicting interests, and each was afforded the right to present evidence. Each party had the right to appeal any and all determinations felt to be adverse to them. Additionally, we note that carrier 1 has a justiciable interest in the outcome of Docket No. 2, to the extent that it may bear upon carrier 1's liability for income benefits. Accordingly, we decline to hold that carrier 1 lacks standing to appeal said findings of fact or conclusions of law.

The hearing officer erred in determining that carrier 2 did not waive the right to dispute the alleged injury of (date of injury for Docket No. 2), even though it did not timely contest compensability; that the claimant did not sustain a compensable repetitive trauma injury on (date of injury for Docket No. 2); and that the claimant did not have disability as a result of the claimed injury of (date of injury for Docket No. 2).

The record reflects, and carrier 2 does not dispute, that carrier 2 first received written notice of the claimed injury dated (date of injury for Docket No. 2), on July 15, 2002. The record further reflects that carrier 2 failed to file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) regarding the claimed injury until September 10, 2003. The hearing officer properly determined that carrier 2 failed to timely file a contest of compensability, but relieved carrier 2 of liability pursuant to Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). In so doing, the hearing officer stated that "[s]ince there was no injury other than the 1999 injury, [carrier 2] did not waive the right to contest compensability by failing to contest compensability within seven days under [Williamson]." It is very clear from the hearing officer's decision and order that he believes that the claimant does in fact have damage or harm to the physical structure of her body. In Williamson, the court held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." The Appeals Panel has previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. When a carrier waives its right to contest compensability of the injury, the injury becomes compensable as a matter of law, provided that there is physical harm or damage to the body, and the carrier is liable for workers' compensation benefits. Texas Workers' Compensation Commission Appeal No. 023017, decided January 27, 2003.

Because we have determined that the hearing officer erred in his application of Williamson to the facts of this case, we must determine that carrier 2 waived its right to contest compensability under Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). Carrier 2 does not dispute the hearing officer's findings that it received written notice of the claimed injury on July 15, 2002, and that it did not file a dispute of compensability with the Texas Workers' Compensation Commission until September 10, 2003. In Downs, the Texas Supreme Court determined that under Sections 409.021

and 409.022, a carrier that fails to take some action within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. See Texas Workers' Compensation Commission Appeal No. 030380-s, decided, April 10, 2003. The fact that the hearing officer ultimately determined that the injuries in question were attributable to the 1999 compensable injury, and placed liability on carrier 1, does not relieve carrier 2 of its statutory obligation to take some action within seven days of receiving written notice of the claimed injury. This it clearly failed to do and as such, carrier 2 waived the right to contest the compensability of the claimed injury of (date of injury for Docket No. 2), and that injury is compensable as a matter of law.

Because we have determined that the claimant did sustain a compensable injury dated (date of injury for Docket No. 2), as a matter of law, we likewise render a decision that the claimant had disability as a result of that compensable injury beginning on March 2, 2002, and continuing through the date of the hearing. We do so because the hearing officer has determined that the claimant's current condition, due to her compensable injury, has rendered her unable to obtain or retain employment at wages equivalent to her preinjury wages for this time period, and that determination is supported by the evidence.

The hearing officer's determinations that the compensable injury of (date of injury for Docket No. 1), extends to and includes a repetitive trauma injury to the left elbow, right shoulder, and left shoulder, and that the claimant had disability as a result of the (date of injury for Docket No. 1), compensable injury beginning on March 2, 2002, and continuing through the date of the hearing are affirmed. The hearing officer's determinations that carrier 2 did not waive the right to dispute the alleged injury of (date of injury for Docket No. 2); that the claimant did not sustain a compensable repetitive trauma injury on (date of injury for Docket No. 2); and that the claimant did not have disability as a result of the claimed injury of (date of injury for Docket No. 2), are reversed and a new decision is rendered that carrier 2 waived the right to dispute the compensability of the alleged injury of (date of injury for Docket No. 2); the claimant did sustain a compensable repetitive trauma injury on (date of injury for Docket No. 2), as a matter of law; and that the claimant did have disability as a result of the (date of injury for Docket No. 2), compensable injury beginning on March 2, 2002, and continuing through the date of the hearing.

The true corporate name of insurance carrier 1 is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

The true corporate name of insurance carrier 2 is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Daniel R. Barry
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

While I concur with the majority in their affirmance of the hearing officer's extent-of-injury and disability determinations, I respectfully disagree with the majority's reversal of the issues involving carrier 2. I do not agree that carrier 2's failure to timely contest the claimed 2002 injury creates liability for an injury that carrier 1 has been determined to be liable for as a result of the extent-of-injury determination. The waiver provisions were not intended to create duplicate liability between two carriers for one distinct injury and, consequently, carrier 1 should not be allowed to rely on waiver to shift its liability to

carrier 2. The effect of the majority's reversal of the determinations involving carrier 2 creates a situation where both carriers are responsible for one injury. However, we have no authority to order joint and several liability or to apportion damages between the two carriers for one injury. For these reasons, I do not agree that under the facts of this case carrier 1 is aggrieved by the determinations relating to carrier 2. Moreover, it does not appear that any party is seeking a determination of duplicate liability. I would have affirmed the hearing officer's determinations relating to carrier 2.

Chris Cowan
Appeals Judge